(3) (2)

Nos. 90-1256 and 90-1415

Supreme Court, U.S.
FILED
APR 8 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

CALIFORNIA ENERGY COMMISSION, ET AL., PETITIONERS

v.

BONNEVILLE POWER ADMINISTRATION, ET AL.

PUGET SOUND POWER & LIGHT COMPANY,
CROSS-PETITIONER

v.

BONNEVILLE POWER ADMINISTRATION, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DENNIS G. LINDER
DOUGLAS LETTER
THOMAS MILLET
SHAWN JENSEN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

HARVARD P. SPIGAL
General Counsel

JAMES O. LUCE
Assistant General Counsel

STEPHEN R. LARSON
Attorney
Bonneville Power Administration
Portland, Oregon 97208

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the court of appeals, in reviewing the challenge to the Long Term Intertie Access Policy promulgated by the Bonneville Power Administration, properly deferred to the Administrator's construction of the governing statutory scheme under the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839 *et seq.*, the Federal Columbia River Transmission System Act, 16 U.S.C. 838 *et seq.*, the Pacific Northwest Consumer Power Preference Act of 1964, 16 U.S.C. 837 *et seq.*, and the Bonneville Project Act of 1937, 16 U.S.C. 832 *et seq.*

2. Whether the court of appeals correctly upheld the Administrator's allocation of access to the Pacific Northwest-Pacific Southwest Intertie, which preferred utilities in the Pacific Northwest over Canadian and other extra-regional utilities.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Aluminum Co. of America v. *Bonneville Power Admin.*, 891 F.2d 748 (9th Cir. 1989) 7

Aluminum Co. of America v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380 (1984) 6, 8

California Energy Resources Conservation & Dev. Comm'n v. *Bonneville Power Admin.*, 831 F.2d 1467 (9th Cir. 1987), cert. denied, 488 U.S. 818 (1988) 5

Capital Cities Cable, Inc. v. *Crisp*, 467 U.S. 691 (1984) 9

Chemical Manufacturers Ass'n v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985) ... 9

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 9

Commodity Futures Trading Comm'n v. *Schor*, 478 U.S. 833 (1986) 9, 15

Department of Water & Power v. *Bonneville Power Admin.*, 759 F.2d 684 (9th Cir. 1985) 4, 7, 13

Dole v. *United Steelworkers*, 110 S. Ct. 929 (1990) 9

EEOC v. *Commercial Office Products Co.*, 486 U.S. 107 (1988) 9

K Mart Corp. v. *Cartier, Inc.*, 486 U.S. 281 (1988) 9

Massachusetts v. *Morash*, 490 U.S. 107 (1989) .. 9

Cases—Continued: Page

Mississippi Power & Light Co. v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988) 9
Missouri v. *Andrews*, 787 F.2d 270 (8th Cir. 1986), aff'd *sub nom. ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495 (1988) 10
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974) 15
NLRB v. *Food & Commercial Workers Local 23*, 484 U.S. 112 (1987) 9
National Fuel Gas Supply Corp. v. *FERC*, 811 F.2d 1563 (D.C. Cir. 1987) 8, 9
New York Shipping Ass'n v. *Federal Maritime Comm'n*, 854 F.2d 1338 (D.C. Cir. 1988) 10
Ohio Power Co. v. *FERC*, 880 F.2d 1400 (D.C. Cir. 1989), rev'd *sub nom. Arcadia, Ohio* v. *Ohio Power Co.*, 111 S. Ct. 445 (1990) 10
Puerto Rico Maritime Shipping Auth. v. *Valley Freight Sys., Inc.*, 856 F.2d 546 (3d Cir. 1988) 9
Wyckoff Co. v. *EPA*, 796 F.2d 1197 (9th Cir. 1986) 9

Treaty, statutes, and regulations:

Treaty Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, United States—Canada, 15 U.S.T. 1555, T.I.A.S. No. 5638 13
Bonneville Project Act of 1937, 16 U.S.C. 832 *et seq.*:
§ 4(a), 16 U.S.C. 832c(a) 15
Federal Columbia River Transmission System Act of 1974, 16 U.S.C. 838 *et seq.*:
§ 2(a), 16 U.S.C. 838(a) 14

Statutes and regulations—Continued: Page

§ 6, 16 U.S.C. 838d 7, 14
§ 9, 16 U.S.C. 838g 5, 6, 10, 11

Pacific Northwest Consumer Power Preference Act of 1964, 16 U.S.C. 837 *et seq.*:
§ 1(b), 16 U.S.C. 837(b) 3
§ 3(a), 16 U.S.C. 837b(a) 14
§ 3(d), 16 U.S.C. 837b(d) 14
§ 6, 16 U.S.C. 837e 5, 6, 10, 11, 12
§ 9, 16 U.S.C. 837h 12

Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. 839 *et seq.*:
§ 3(14)(A), 16 U.S.C. 839a(14)(A) 3
§ 9(e)(5), 16 U.S.C. 839f(e)(5) 6

12 U.S.C. 1452-1455 8

20 U.S.C. 1087-2 8

Pub. L. No. 88-257, 77 Stat. 844 (1963) 11

Pub. L. No. 88-511, 78 Stat. 682 (1964) 11

Miscellaneous:

55 Fed. Reg. 13,824 (1990) 6, 15

H.R. Conf. Rep. No. 1822, 88th Cong., 2d Sess. (1964) 13

H.R. Rep. No. 590, 88th Cong., 1st Sess. (1963) 12, 14

H.R. Rep. No. 1375, 93d Cong., 2d Sess. (1974) 15

S. Rep. No. 122, 88th Cong., 1st Sess. (1963) .. 12

S. Rep. No. 1030, 93d Cong., 2d Sess. (1974) .. 14

Oversight Hearing on Intertie Access Policy of the Bonneville Power Administration Before the Subcomm. on Water and Power Resources of the House Comm. on Interior and Insular Affairs, 100th Cong., 1st Sess. (1987) 15

Miscellaneous – Continued: Page

Oversight Hearing on Potential Impacts of the Proposed U.S.-Canada Free Trade Agreement on California and Pacific Northwest Power Resources Before the Subcomm. on Water and Power of the House Comm. on Interior and Insular Affairs, 100th Cong., 2d Sess. (1988) 15

U.S. Dep't of the Interior, *Report to the Appropriations Committees of the Congress of the United States Recommending a Plan of Construction and Ownership of EHV Electric Interties Between the Pacific Northwest and Pacific Southwest* (Comm. Print 1964) 14

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1256

CALIFORNIA ENERGY COMMISSION, ET AL., PETITIONERS

v.

BONNEVILLE POWER ADMINISTRATION, ET AL.

No. 90-1415

PUGET SOUND POWER & LIGHT COMPANY,
CROSS-PETITIONER

v.

BONNEVILLE POWER ADMINISTRATION, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A36) is reported at 909 F.2d 1298.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1990. A petition for rehearing was denied on October 5, 1990. Pet. App. D1-D4. On December 21, 1990, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 4, 1991. The petition was filed on that date. The cross-petition for

a writ of certiorari was filed on March 8, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners and cross-petitioner, various California utility regulatory bodies, several California utilities, and one Washington utility, have challenged the validity of the Long Term Intertie Access Policy promulgated by the Bonneville Power Administration to allocate electric transmission capacity in the Pacific Intertie among various utilities connected to that high voltage energy transmission system.

1. Respondent Bonneville Power Administration (BPA) is an independent, self-financed agency within the United States Department of Energy. BPA markets electric energy generated largely from dams in the Federal Columbia River Power System. As part of that task, BPA operates a large transmission system, including the federal share of the Pacific Intertie, a high voltage electrical energy transmission system connecting BPA and utilities in the Pacific Northwest with utilities in California.[1] Congress approved construction of the Intertie in order to create a market for surplus federal electric power and thereby help BPA repay the federal investment in Northwest hydroelectric facilities. BPA currently owes approximately $8 billion to the United States Treasury. Pet. App. E57.

The Intertie's capacity is finite. As a result, shortly after the Intertie was completed in 1968, BPA and utilities in the Pacific Northwest entered into an agreement regarding short-term allocation of BPA's Intertie capacity—the

[1] BPA controls a majority of the Intertie north of the Oregon-California border. California utilities, including petitioners Pacific Gas & Electric Company and Southern California Edison Company, own and control the southern portion of the Intertie. Pet. App. E58.

Exportable Agreement of 1969. The Agreement was based on the following fundamental characteristic of the power generation system. The ability of a hydroelectric dam to store energy in the form of water is limited to the capacity of the reservoirs behind the dams. When river flows are high, reservoirs full, and markets not available, "spill"—the flow of excess water past turbines without the generation of energy—takes place and results in the loss of the electrical generation capacity of the spilled water. The Agreement therefore allocated federal Intertie capacity on a pro rata basis among BPA and Pacific Northwest generating utilities for surplus energy that might otherwise be wasted because of the need to spill.[2] When a spill was threatened, the Agreement reserved federal Intertie capacity for the use of BPA and Pacific Northwest generators. At these times, the Agreement excluded extra-regional utilities, including Canadian sources, from access to the Intertie. Pet. App. C6.

2. In the early 1980s, an unexpected increase in the availability of surplus power in the Pacific Northwest and elsewhere, together with a significant downturn in BPA's finances, prompted BPA to reexamine the allocation of Intertie capacity. Pet. App. E3-E4. As a result, BPA initiated the extensive administrative process that ultimately led to the final Long Term Intertie Access Policy (LTIAP) at issue here.

In 1984, after public hearings and opportunity for comment, BPA promulgated the Interim Near Term Access Policy. That policy included a formula allocation provision

---

[2] Section 1(b) of the Pacific Northwest Consumer Power Preference Act of 1964 (Preference Act), 16 U.S.C. 837(b), defines the Pacific Northwest to include Oregon, Washington, and portions of Montana, Nevada, Utah, Wyoming, and Idaho. The Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839a(14)(A), later included the entire State of Idaho.

governing short-term surplus sales. Pet. App. C9-C10. In relevant part, that provision incorporated the pro rata allocation of the Exportable Agreement in times of spill. *Id.* at C10 (Condition 1). Where spill was not threatened, but where BPA and Northwest utilities had hourly surplus power exceeding available federal Intertie capacity, that capacity was allocated according to a ratio that approximated each party's surplus to the sum of all declared surplus *Id.* at C11-C12 (Condition 2). Where spill was not threatened and where declared surplus in the region did not exceed the available capacity of the federal Intertie, each Northwest party was permitted access to the Intertie to the full extent of its surplus, and any remaining capacity was made available for Canadian and other extra-regional utilities. *Id.* at C10-C11 (Condition 3).

Petitioner Department of Water and Power of the City of Los Angeles challenged BPA's Interim Near Term Access Policy, including its provisions excluding Canadian power other than in Condition 3. In *Department of Water & Power* v. *Bonneville Power Admin.* (*LADWP*), 759 F.2d 684 (9th Cir. 1985) (Pet. App. C1-C24), the court of appeals rejected that challenge, concluding that BPA may properly allocate its Intertie capacity on a pro rata basis and that BPA may prefer itself and Pacific Northwest utilities over Canadian and other extra-regional utilities. As the court explained, "Congress intended that the Intertie be used primarily for the benefit of Northwest and Southwest utilities and not for the benefit of Canadian utilities." Pet. App. C22.

3. Following the development of the Interim Policy, BPA continued with its extensive administrative process and promulgated the Near Term Intertie Access Policy in 1985. In relevant part, the Near Term Policy carried forward the allocation scheme under the three Conditions established by the Interim Near Term Policy. Pet. App. B5-B6. Peti-

tioners California Energy Commission (CEC) and California Public Utilities Commission (CPUC) promptly challenged the Near Term Policy. Petitioners contended that BPA exceeded its authority by allocating Intertie access on a pro rata basis and that, under 16 U.S.C. 837e and 838d, BPA could not limit access by Canadian and extra-regional utilities.

On the basis of its earlier *LADWP* decision, the court of appeals rejected petitioners' challenge, holding that BPA's allocation scheme and preference for Northwest utilities were lawful. *California Energy Resources Conservation & Dev. Comm'n* v. *Bonneville Power Admin.* (*CEC I*), 831 F.2d 1467 (9th Cir. 1987) (Pet. App. B1-B25), cert. denied, 488 U.S. 818 (1988).

4. In May 1988, after further administrative proceedings, BPA adopted the final Long Term Intertie Access Policy (LTIAP). In relevant part, BPA adhered to the basic short-term allocation scheme contained in the prior policies. Under Condition 1, which obtains during periods of threatened spill, the Intertie's available capacity is allocated on an hourly pro rata basis among BPA and those Northwest utilities declaring surplus power. Pet. App. E6-E10. Under Condition 2, which obtains during periods when the declared supply of surplus energy in the Northwest exceeds Intertie capacity, the Intertie's capacity is allocated on that same pro rata basis. *Id.* at E11. Under Condition 3, which obtains "when the declarations of BPA and Northwest utilities are less than Intertie capacity," *ibid.*, access by BPA and the Northwest utilities for their declared surplus amounts is unrestricted, with Canadian utilities and others permitted access to any remaining capacity, *id.* at E11-E12.

Petitioners, including cross-petitioner (collectively petitioners), and others had complained to BPA that the hourly allocation scheme under the proposed LTIAP unnecessarily limited competition. As a result, BPA's final

LTIAP suspended the operation of the Conditions 2 and 3 allocations in favor of an 18-month experiment where no individual nonfederal allocations would be made after BPA received its allocation. Instead, under Condition 2, all short-term capacity not used by BPA would be made available to the Northwest utilities as a block, to be allocated on a first-come, first-served basis to those utilities arranging transactions with California utilities. This allocation for Northwest utilities would also obtain under Condition 3; any remaining capacity would be made available to Canadian and other extra-regional utilities. As it turned out, water levels allowed the experiment to proceed on only 20 days out of the originally planned 18-month period. BPA has thus extended the experiment until September 1991, in order to gather more data. See 55 Fed. Reg. 13,824 (1990).

In the meantime, petitioners and others challenged the LTIAP before the court of appeals under 16 U.S.C. 839f(e)(5). They contended, among other claims, that BPA's construction of the governing statutory scheme should not be accorded substantial deference "because it has an economic interest in obtaining a larger share of the economic benefits of the interregional transactions." Pet. App. A13. On the merits, petitioners argued that the LTIAP unlawfully discriminates against Canadian power, contrary to the provisions of the Federal Columbia River Transmission System Act (Transmission Act) and the Preference Act. See 16 U.S.C. 837e, 838d.

5. In July 1990, the court of appeals "conclude[d] that BPA's actions and decisions in developing the LTIAP were not arbitrary and capricious and [therefore] affirm[ed] the LTIAP in its entirety." Pet. App. A36. Following *Aluminum Co. of America* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389-390 (1984), the court of appeals concluded that "[b]ecause BPA drafted the Northwest

Power Act, its interpretation of the Act is to be given 'great weight' and should be upheld if reasonable." Pet. App. A12. The court disagreed with petitioners' suggestion that BPA should not receive such deference "because it has an economic interest" in the subject matter under review. *Id.* at A13. As the court explained, "BPA did not draft the LTIAP to maximize its revenues," and it had previously "rejected the argument that BPA is entitled to no deference in ratemaking decisions, even where it has an interest in the outcome." *Ibid.* (citing *Aluminum Co. of America* v. *Bonneville Power Admin.*, 891 F.2d 748, 757 n.12 (9th Cir. 1989)). Turning to petitioners' substantive attack on the LTIAP, the court pointed out that it had previously reviewed and rejected that contention in *LADWP*, 759 F.2d at 693-694 (Pet. App. C20-C22). The court therefore reaffirmed that ruling. Pet. App. A25-A26 & n.14.

ARGUMENT

1. Petitioners contend that the court of appeals erred in deferring to BPA's construction of the governing statutory scheme, where the agency has a "direct and immediate financial interest in [its] own decision[]." Pet. 13; Cross-Pet. 11-12. As an initial matter, petitioners overstate the circumstances under which BPA operates. First, as the court of appeals expressly found, "BPA did not draft the LTIAP to maximize its revenues." Pet. App. A13. Second, petitioners' branding of BPA as "proprietary" (Pet. 13) is a mischaracterization. Although BPA is self-financed and not funded by tax revenues, it is not a profit-making firm. Rather, Congress expressly charged the agency with maintaining "the lowest possible rates to consumers consistent with sound business principles," 16 U.S.C. 838g, while at the same time directing it to recover costs and make timely

repayment of the $8 billion federal investment in the Columbia River Power System.[3]

In any event, this Court's decision in *Aluminum Co. of America* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380 (1984) (*ALCOA*), forecloses petitioners' contention. There, BPA specifically informed the Court of its substantial financial stake in the statutory question at issue. See Brief for Federal Respondent at 19, *Aluminum Co. of America* v. *Central Lincoln Peoples' Util. Dist.*, No. 82-1071. Nonetheless, this Court held that "[u]nder established administrative law principles, it is clear that the Administrator's interpretation of the [Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839 *et seq.*,] is to be given great weight." *ALCOA*, 467 U.S. at 389.

Petitioners' claim (Pet. 13-14; Cross-Pet. 11) that the court of appeals' decision conflicts with *National Fuel Gas Supply Corp.* v. *FERC*, 811 F.2d 1563 (D.C. Cir. 1987), is insubstantial. The isolated statement petitioners seize upon—that "deference would be inappropriate * * * if the agency itself were an interested party to the [settlement] agreement," *id.* at 1571—has no application here. BPA is not construing an agreement between private parties; BPA is construing its own governing statutory scheme. Indeed, the statement petitioners trumpet had no application to the case before the D.C. Circuit. There, the court of appeals reviewed FERC's construction of a settlement agreement to which the agency was not a party. In those circumstances, given the agency's acknowledged expertise and the fact that

---

[3] Petitioners thus mistakenly suggest (Pet. 15) that BPA operates as a traditional business, as do other independent government corporations, such as the Federal Home Loan Mortgage Corporation, see 12 U.S.C. 1452-1455, and the Student Loan Marketing Association, see 20 U.S.C. 1087-2.

"Congress required the Commission to take an active role in approving [settlement] agreement[s]," *ibid.*, the D.C. Circuit did not hesitate to defer to FERC's reading of the agreement at issue, *id.* at 1568-1572. That is precisely what the court of appeals did here.

Petitioners' suggestion (Pet. 14-15; Cross-Pet. 11-12) that the courts of appeals are divided over whether an agency is entitled to deference when construing the scope of its own jurisdiction is similarly unpersuasive. This Court has consistently deferred to agencies' determinations regarding their statutory jurisdiction. See, *e.g.*, *Massachusetts* v. *Morash*, 490 U.S. 107, 114-118 (1989); *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292-293 (1988); *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 114-116 (1988); *NLRB* v. *Food & Commercial Workers Local 23*, 484 U.S. 112, 123-128 (1987); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 845 (1986); *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125-126 (1985); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 700 (1984); see also *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). Indeed, as Justice Scalia recently stated, "it is settled law that the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction." *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988) (concurring in the judgment); see *Dole* v. *United Steelworkers*, 110 S. Ct. 929, 944 (1990) (White, J., dissenting). For that reason, the lower courts have had little difficulty applying that principle of administrative law. See, *e.g.*, *Puerto Rico Maritime Shipping Auth.* v. *Valley Freight Sys., Inc.*, 856 F.2d 546, 552 (3d Cir. 1988); *Wyckoff Co.* v. *EPA*, 796 F.2d 1197, 1200-1201 (9th Cir. 1986).

Finally, petitioners' assertion (Pet. 14) that decisions of the D.C. and Eighth Circuits conflict with this approach

lacks foundation. In *Ohio Power Co.* v. *FERC*, 880 F.2d 1400 (D.C. Cir. 1989), rev'd on other grounds *sub nom. Arcadia, Ohio* v. *Ohio Power Co.*, 111 S. Ct. 415 (1990), the court of appeals declined to defer to the agency's interpretation *not* because the statute at issue involved the agency's jurisdiction, but rather because the agency itself claimed no such deference since that statute "cannot be said to be entrusted to FERC's administration." 880 F.2d at 1405.[4] And in *Missouri* v. *Andrews*, 787 F.2d 270 (8th Cir. 1986), aff'd on other grounds *sub nom. ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495 (1988), the court of appeals refused to defer to the Secretary of the Interior's construction of Section 9(c) of the Flood Control Act because the court of appeals' "review of the Act and its legislative history convince[d] [the court] that Congress did not intend to grant the Secretary * * * the authority [at issue]." 787 F.2d at 287. That decision, contrary to petitioners' suggestion, is merely a straightforward application of the *Chevron* framework.

2. Turning to the merits of the underlying controversy, petitioners contend (Pet. 16-21) that the court of appeals erred in upholding the Administrator's allocation of access to the Pacific Northwest Pacific-Southwest Intertie, which preferred utilities in the Pacific Northwest over Canadian and other extra-regional utilities. In petitioners' view, Section 6 of the Preference Act, 16 U.S.C. 837e, and Section 6 of the Transmission Act, 16 U.S.C. 838d,[5] mandate

[4] Similar reasoning accounts for the court of appeals' declining to defer to the agency's construction of the statute at issue in *New York Shipping Ass'n* v. *Federal Maritime Comm'n*, 854 F.2d 1338, 1362 (D.C. Cir. 1988) ("We note with interest that this is not a case in which the Commission lays claim to any deference for its interpretation.").

[5] Section 6 of the Pacific Northwest Consumer Power Preference Act of 1964, 16 U.S.C. 837e, provides in pertinent part:

> Any capacity in Federal transmission lines connecting, either by themselves or with non-Federal lines, a generating plant in the

that BPA give Canadian and other extra-regional utilities the same Intertie access as nonfederal Pacific Northwest utilities to arrange transactions with California utilities.[6]

a. Congress enacted the Preference Act in 1964 as part of the legislative package authorizing construction of the Intertie. See Pub. L. No. 88-257, 77 Stat. 844 (1963); Pub. L. No. 88-511, 78 Stat. 682 (1964). On its face, Section 6 of the Preference Act requires BPA to make excess capacity "available as a carrier." 16 U.S.C. 837e. Under the LTIAP, BPA makes available excess Intertie capacity as a

---

Pacific Northwest or Canada with the other area or with any other area outside the Pacific Northwest, which is not required for the transmission of Federal energy or the energy described in section 837h of this title, shall be made available as a carrier for transmission of other electric energy between such areas.

Section 6 of the Federal Columbia River Transmission System Act, 16 U.S.C. 838d, provides:

> The Administrator shall make available to all utilities on a fair and nondiscriminatory basis, any capacity in the Federal transmission system which he determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States.

[6] Cross-petitioner Puget Sound Power & Light Company challenges (Cross-Pet. i) BPA's allocation of "Assured Delivery" amounts among Pacific Northwest utilities. That challenge is groundless. Under the Assured Delivery provisions of the LTIAP, each utility granted an Assured Delivery allocation is guaranteed access to the Intertie in the amount allocated in order to permit firm power sales. Unallocated Assured Delivery capacity remains available for seasonal exchanges of power. BPA did not grant cross-petitioner an Assured Delivery allocation because that utility did not have any average firm surplus power that could be used for firm sales. See Pet. App. E169-E170. Nonetheless, BPA agreed to review cross-petitioner's complaint upon completion of the planned third Intertie. *Id.* at E71. In the meantime, cross-petitioner,

carrier for transmission of energy for the Northwest utilities and others. That is all that the statute requires. Contrary to petitioners' submission, the plain terms of 16 U.S.C. 837e do not circumscribe the Administrator's discretion in allocating excess Intertie capacity and do not require BPA to transmit Canadian power on the same terms as Northwest power.

Even if resort to the legislative record were appropriate, that record fully supports the decision below. The House Report states that the Administrator "may" enter into agreements for the wheeling of energy generated in Canada. H.R. Rep. 590, 88th Cong., 1st Sess. 9 (1963); see also S. Rep. No. 122, 88th Cong., 1st Sess. 12 (1963). Although petitioners point out (Pet. 18) that the House Report states that non-Treaty Canadian power "stands on the same basis as any other non-Federal energy," H.R. Rep. 590, *supra*, at 9, the very next sentence makes plain that this statement merely distinguishes non-Treaty Canadian power from the priority access granted to Canadian Treaty power by statute. See 16 U.S.C. 837h.[7] In context, therefore, the Report does

---

along with other utilities, may seek to obtain Assured Delivery for seasonal exchanges. *Id.* at E162-E171.

Cross-petitioner also challenges in passing (Cross Pet. 5-7) the Condition 1 "true-up" mechanism that retains any unused BPA allocations for later BPA use. Because the unsold federal energy represented by the unused allocations is likely being retained behind the federal dams, the need for that Intertie capacity continues through time. Failure to incorporate such a mechanism could increase the amount of spill on the federal hydroelectric system. Pet. App. E88-E89. The true-up mechanism therefore properly ensures that federal needs have priority use of the Intertie.

[7] So-called "Canadian Treaty power" refers to Canada's share of power generated at hydroelectric facilities in the Pacific Northwest as

not suggest that Canadian power must be given the same access as that afforded to Pacific Northwest utilities.[8]

BPA's contemporaneous construction of the statute further suggests that Congress had no intention of treating non-Treaty Canadian power on the same basis as Northwest power. The Department of the Interior (BPA's parent agency at that time) reported to Congress that "BPA has assured the public and private utilities *of its service area* access over [BPA's] lines to California, Nevada, and Arizona markets." U.S. Dep't of the Interior, *Report to the Appropriations Committees of the Congress of the United States Recommending a Plan of Construction and Ownership of EHV Electric Interties Between the Pacific Northwest and Pacific Southwest* 27 (Comm. Print 1964) (emphasis added). And in recommending enactment of the Preference Act, the Conference Committee expressly endorsed that report. H.R. Conf. Rep. No. 1822, 88th Cong., 2d Sess. 3-4 (1964). Moreover, BPA's first implementations of the legislation—the Exportable Agreement and other Intertie agreements—were each limited to Northwest and Southwest utilities and did not include any Canadian utility. And the Secretary of the Interior transmitted these agreements—including the provisions regarding pro rata allocations—to Congress.

---

a result of the increased water flows from the Canadian reservoirs built in conjunction with the Treaty. Canada is entitled to one half of this generation. See Treaty Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, United States-Canada, 15 U.S.T. 1555, T.I.A.S. No. 5638. BPA must provide priority intertie access for Canadian Treaty power sold to California utilities. No such transactions currently exist, however. See *LADWP*, 759 F.2d at 694 n.15.

[8] Indeed, throughout the legislative record, descriptions of the benefits accruing from an intertie system focused on benefits flowing to the Pacific Northwest and the Pacific Southwest. See H.R. Conf.

b. Petitioners fare no better in invoking the "plain language" (Pet. 16) of Section 6 of the Transmission Act, 16 U.S.C. 838d. As the prefatory provision of the Act makes clear, Congress enacted the statute "in order to enable the Secretary of the Interior to carry out the policies of [the Preference Act] relating to the marketing of electric power from hydroelectric projects *in the Pacific Northwest*." 16 U.S.C. 838(a) (emphasis added). In other words, Congress identified Pacific Northwest power as the intended beneficiary of the Act. Indeed, petitioners' construction would create serious anomalies in the statutory scheme. For example, Congress has imposed several limitations to insure that the benefits of Northwest power are made available primarily to the Pacific Northwest area. See, *e.g.*, 16 U.S.C. 837b(a) (BPA must stop sales of surplus energy to California if Northwest needs the power); 16 U.S.C. 837b(d) (nonfederal Northwest utilities making firm sales to California have limited ability to rely on BPA's firm sales). Under petitioners' "equal access" theory, Canadian power would not be subject to these limitations and, as a result, would presumably have a competitive advantage.

The legislative record confirms that Congress enacted Section 838d in order to clarify BPA's obligation to treat public and private utilities alike in granting access to its transmission system. See H.R. Rep. No. 1375, 93d Cong., 2d Sess. 5 (1974); see also S. Rep. No. 1030, 93d Cong., 2d Sess. 9 (1974) (BPA's obligation is limited to transmitting power "in and from the Pacific Northwest."). The statutory provision thus stands in contrast to BPA's obligation – as a

---

Rep. No. 1822, 88th Cong., 2d Sess. 7 (reprinting letter from Secretary of Interior); H.R. Rep. No. 590, *supra*, at 2; U.S. Dep't of the Interior, *Report to the Appropriations Committees of the Congress of the United States Recommending a Plan of Construction and Ownership of EHV Electric Interties Between the Pacific Northwest and Pacific Southwest* 32 (Comm. Print 1964).

seller of Federal power—"at all times * * * [to] give preference and priority to public bodies and cooperatives." 16 U.S.C. 832c(a). Congress inserted the Transmission Act's "fair and nondiscriminatory" language to preclude preference utilities from asserting that they had priority over investor-owned utilities to BPA's transmission services. See H.R. Rep. No. 1375, *supra*, at 5.[9]

3. Finally, petitioners' complaint (Pet. 21-23) that the LTIAP transfers substantial wealth from California utilities to the Pacific Northwest is premature. BPA adopted the policy based on its considered judgment that the LTIAP could be expected to divide the benefits of the Intertie in roughly equal proportions between the two regions. Pet. App. E247. Nonetheless, in response to comments by petitioners and others, BPA incorporated an experiment in the LTIAP to test the impact of more open competition among nonfederal Northwest utilities in Condition 2 and among all utilities in Condition 3. See Pet. App. E10-E12, E37-E38.

---

[9] Moreover, despite oversight hearings on BPA's pertinent Intertie access policies, Congress has not expressed opposition to them. See *Oversight Hearings on Intertie Access Policy of the Bonneville Power Administration Before the Subcomm. on Water and Power Resources of the House Comm. on Interior and Insular Affairs*, 100th Cong., 1st Sess. (1987); *Oversight Hearing on Potential Impacts of the Proposed U.S.-Canada Free Trade Agreement on California and Pacific Northwest Power Resources Before the Subcomm. on Water and Power of the House Comm. on Interior and Insular Affairs*, 100th Cong., 2d Sess. (1988). Congress's failure to revise or repeal those policies construing the governing statutory scheme "is persuasive evidence that the interpretation is one intended by Congress." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974)).

BPA has since extended this experiment to October 1, 1991, in order to gather more data. See 55 Fed. Reg. 13,824 (1990). In these circumstances, petitioners' complaint here seeks to sidestep BPA's ongoing efforts to minimize any unnecessary economic upheaval.[10]

CONCLUSION

The petition and cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

HARVARD P. SPIGAL
General Counsel

JAMES O. LUCE
Assistant General Counsel

STEPHEN R. LARSON
Attorney
Bonneville Power Administration

DENNIS G. LINDER
DOUGLAS LETTER
THOMAS MILLET
SHAWN JENSEN
Attorneys

APRIL 1991

[10] Petitioners gloss over the fact that, in addition to the rights provided to Canadian power in Condition 3, the LTIAP provides opportunities for transmission of firm Canadian power to California utilities. Pet. App. E38-E39, E196-E197.

U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061:20466